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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1504

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CEMENT TRANSPORT, INC., - - Petitioner

versus

NATIONAL LABOR RELATIONS BOARD, - Respondent

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## REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1594

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CEMENT TRANSPORT, INC., - - - *Petitioner*

*v.*

NATIONAL LABOR RELATIONS BOARD, - *Respondent*

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## REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Paragraphs 4 and 5 of Rule 24 of the Revised Rules of the Supreme Court of the United States, Cement Transport, Inc., the Petitioner herein (hereafter called "the Company"), hereby files with the Court this Reply and Supplemental Brief in support of the Company's petition for a writ of certiorari.

In this Reply and Supplemental Brief, we want to address arguments first raised in the Brief for the National Labor Relations Board in Opposition to the Company's petition and to call the Court's attention to certain new cases not available to the Company at the time of the filing of its petition. More specifically, we want to (1) answer the Board's assertion that in the case at bar it passed upon the status of the Company's owner-drivers, and (2) refute the Board's fur-

ther contention (at page 13 of its Brief) that the Company's petition here "raises only a factual issue which does not warrant further review," rather than a very serious question of law and conflicting decisions by the Board and the Courts.

(1) In its brief, the Board repeatedly states that "*the Board* found that the Company's single-owner drivers were employees, not independent contractors" in both the instant unfair labor practice case and the related representation case. (Our emphasis. See pages 3 (Footnote 1), 11 and 13 of the Board's brief.) *That is simply not true.* The Board itself has not ruled on the status of the Company's single owner-drivers since *1967,* when it held them to be employees in *Cement Transport, Inc.,* 162 NLRB 1261. But see *Cement Transport, Inc.,* 111 NLRB 175 (1955), where the Board held them to be independent contractors.

The Board *never* decided this issue in the related representation case in 1972. The Company's request for review of the Regional Director's decision in that case was simply "denied" on April 20, 1972, without further explanation, by a telegram signed only "By direction of the Board." Under the Board's standard practice and procedure in this type of case, as admitted by it in *KFC National Management Corp.* v. *N.L.R.B.,* —— F. 2d ——, 74 CCH Lab. Cas. ¶10,035 (2nd Cir. May 8, 1974), it thus appears that only one member of the Board participated in the decision to deny the Company's petition for review. In any event, no grounds for that decision were ever stated on the record.

In this connection, the Board's brief to this Court states on page 13 that "the Board . . . considered the total employment relationship in concluding that the Company's single-owner drivers were employees." Again, that is not correct.

The Board *never* considered or addressed itself to the independent contractor issue in its Decision and Order in the unfair labor practice case, but instead merely affirmed "the rulings, findings and conclusions of the Administrative Law Judge" (Appendix B, page 13a). The Administrative Law Judge never really discussed or ruled on this issue either, as he slavishly relied upon *Cement Transport, Inc.,* 162 NLRB 1261 (1967), and the Regional Director's Decision and Direction of Election of March 22, 1972 in the representation case in holding that Thompson "is an employee within the meaning of the Act" (Appendix B, pages 25a-26a).

(2) The Regional Director expressly based his finding in the 1972 representation case that the drivers for the Company are employees upon the 1967 Cement Transport Case and *Indiana Refrigerator Lines, Inc.,* 157 NLRB 539 (1966) (Appendix B, page 42a). In the 1967 Cement Transport Case, the Board stated the grounds for its conclusion that the drivers are employees in Footnote 11 of its opinion, to wit:

> "We find no merit in the Employer's contention that the Board is foreclosed from deciding here that the drivers of leased equipment are employees, in view of the decision in *Cement Transport, Inc.,* 111 NLRB 175. *In that proceeding, which in-*

> *volved the same parties and the same plant as here, the Board held that the equipment owners were independent contractors* . . . The earlier decision, in our opinion, took an unduly limited view of certain aspects of the relationship between the Employer and the drivers of leased equipment, *particularly as to the impact of the ICC regulations on the extent of the Employer's control over them.* In view of the totality of the facts here, *particularly in the light of the recent decision in the Indiana Refrigerator Lines* case, *supra,* we conclude that these drivers are employees" (Our emphasis).

Thus, the Board's ultimate conclusion that Thompson was an employee is based on the ICC (and now the DOT) regulations and *Indiana Refrigerator.* Indeed, on page 13 of its brief to the Sixth Circuit in this case, the Board stated, "The pertinent government regulations governing Company operations, *alone,* establish a high degree of Company control over single owner-drivers," and "the powers necessarily exercised by the Company *pursuant to the government's regulation of the trucking industry* require it to bear complete responsibility for and to exercise substantial control over the operations of the single owner-drivers," citing *Indiana Refrigerator* (Our emphasis).

The Sixth Circuit went along with that argument and relied almost entirely on the Federal safety regulations in concluding that the Company's single owner-drivers are employees (Appendix A, pages 3a-4a). Seven of the twelve factors cited by the Regional Director in support of his decision in the 1972 representation case (see pages 7-8 of the Board's brief to

this Court) are *required* by those regulations, and the other five factors have been held by the Board not to make single owner-drivers employees rather than independent contractors (see the cases cited on page 8 of the Company's petition).

A minority of the Board (Members Fanning and Jenkins) still adhere to the view that the Federal safety regulations *per se* make single owner-drivers employees. See for example, *Florida-Texas Freight, Inc.*, 197 NLRB No. 158 (1972); *Pony Trucking, Inc.*, 198 NLRB No. 59 (1972), affd. 486 F. 2d 1039 (6th Cir. 1973); and *Deaton, Inc.*, 203 NLRB No. 172 (1973).

The one connecting link that runs through all of these cases, from *Indiana Refrigerator* on through the Sixth Circuit's decision in the instant case, is the ICC and DOT safety regulations. Those regulations provide the basis for every Board and Court ruling that single owner-drivers are employees and not independent contractors.

However, this was not always the case, just as it is not true now (if the case comes before the present majority of the Board). Before *Indiana Refrigerator, supra,* the Board uniformly held that single owner-drivers were independent contractors *despite* the safety regulations. See for instance, *Oklahoma Trailer Convoy, Inc.*, 99 NLRB 1019 (1952); *Malone Freight Lines, Inc.*, 106 NLRB 1107 (1953); *Hugh Major, d.b.a. Hugh Major Truck Service,* 124 NLRB 1387 (1959); and *Reisch Trucking and Transportation Co., Inc.*, 143 NLRB 953 (1963). The majority of the

Board has reverted to that view. In addition to the cases cited on page 8 of the Company's petition, see also *Kreitz Motor Express, Inc.*, 210 NLRB No. 11 (April 10, 1974), and *Daily Express, Inc.*, 211 NLRB No. 19 (May 31, 1974).

In its brief to this Court (pages 13-14), the Board seeks to distinguish the latter cases from the case at bar *solely* on the ground that in "*each* of those cases, the drivers were free to accept or decline loads without penalty." That statement is not strictly accurate, for in one of those cases, *Fleet Transport Co., Inc.*, 196 NLRB 436 (1972), owner-drivers who refused to accept loads *were* penalized. See also, *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655 (6th Cir. 1944). It is significant here that *Fleet Transport* was the first case on this point decided by the new Board majority, and that it, in effect, overruled *Indiana Refrigerator* and subsequent cases.

Moreover, we wish to point out that this Court has very recently stated that a Court of Appeals "*correctly declined to resolve those inconsistencies* [between two Board decisions] *by substituting Board Counsel's rationale for that of the Board,*" citing *N.L.R.B.* v. *Metropolitan Life Insurance Company*, 380 U. S. 438 (1965) (Our emphasis). *N.L.R.B.* v. *Food Store Employees Union, Local 347*, —— U. S. ——, 40 L. Ed. 2d 612, 94 S. Ct. (May 20, 1974). In the *Metropolitan* Case, in a similar situation, the Court held that "the integrity of the administration process requires that 'courts may not accept appellate counsel's *post hoc* rationalizations for agency action. . . .'" Likewise,

this Court should not accept Board counsel's rationale in the present case when the Board itself has *never* in this case distinguished or even mentioned or commented upon its most recent decisions with regard to owner-drivers.

Thus, the Court is presented here squarely with the question of law as to whether or not the ICC and DOT safety regulations turn single owner-drivers into employees instead of independent contractors.

Consequently, the Court should grant the Company's petition for a writ of certiorari in the case at bar because of the conflicting Court and Board decisions on the points at issue herein, because the Sixth Circuit's decision in this case decided important questions of Federal law which have not been (but should be) settled by this Court, and because the Sixth Circuit's decision has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

We therefore earnestly reaffirm the Company's request that its petition be granted.

Respectfully submitted,

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